subsists between the class of appointees and the donee. Another opinion,[19] carefully reasoned, follows the English classification of powers, but excepts from the rule powers in gross where there is no gift over in default of appointment. A third jurisdiction early held the doctrine with strictness to its technical foundation in the law of tortious conveyances;[20] a fourth, almost without argument, rejected it altogether.[21] And now that its result is disapproved at home, it is not to be supposed that a mediæval theory, resting upon the historical quality of methods of conveyancing abolished in the land where they originated, will maintain itself in jurisdictions[22] where those methods never were known or long ago became obsolete.

LIABILITY OF AN ANOMALOUS INDORSER AT COMMON LAW AND UNDER THE NEGOTIABLE INSTRUMENTS LAW. — The precise nature of the obligation of one whose signature appears on the back of a bill or note before that of the payee has been always a subject of hopeless conflict at the common law. On the continent such an anomalous indorser is known as an *aval*, and is held liable to all subsequent parties as surety for that person to facilitate whose transfer the *aval* was given.[1] Most of the decisions under the common law agree that the extent of the liability depends wholly upon the intention of the parties; and various presumptions are resorted to for determining that intention. There are at least four distinct rules.

Such a signature is not an indorsement in appearance, since it precedes that of the payee, and therefore is not a link in the chain of title. Nor is it an acceptance, for only a drawee or one accepting for the honor of the maker can be an acceptor.[2] Hence many courts conclude that such an indorser should be presumed to have signed as co-maker.[3] It is so held in a recent case. *Barden* v. *Hornthal*, 65 S. E. 513 (N. C.). Other courts declare the anomalous indorser to be presumably a surety for the maker.[4] Both of these rules are objectionable, however, because, judged by ordinary mercantile custom, their presumptions are in the majority of cases contrary to fact. Still a third presumption is that the anomalous indorser is a second indorser,[5] the payee, by necessity being the first. And as this rule fails to protect the payee, the New York court, to effect that desirable result, ekes out the main presumption with a fiction, by which the payee is conclusively presumed to have indorsed without recourse to the anomalous indorser, and the latter to have indorsed back to the payee. In this way his liability is made that of a first indorser.[6] The sole merit of so violent a fiction is that it does afford a means of carrying out the probable intention

---

[19] Atkinson *v.* Dowling, 33 S. C. 414.
[20] Gaskins *v.* Finks, 90 Va. 384.
[21] Learned *v.* Tallmadge, 26 Barb. (N. Y.) 443, 451.
[22] 4 KENT, COMMENTARIES, 12 ed., 497.

[1] Steele *v.* McKinlay, 5 App. Cas. 754. See 11 HARV. L. REV. 54.
[2] Jackson *v.* Hudson, 2 Camp. 447.
[3] Draper *v.* Weld, 13 Gray 580. See DANIEL, NEGOTIABLE INSTRUMENTS, § 713 a.
[4] Ewan *v.* Brooks-Waterfield Co., 55 Oh. St. 596, 606. It would be as sensible to presume him a surety for the acceptor; but such a presumption seems not to have been indulged. See Steele *v.* McKinlay, *supra*, 764.
[5] Eilbert *v.* Finkbeiner, 68 Pa. St. 247.
[6] Moore *v.* Cross, 19 N. Y. 227.

of the parties. Finally, in New Jersey alone, the courts raise no presumption whatever, so that the allegation must be established by parol evidence.[7] An attempt has been made to treat the three positive rules of presumption as not mutually exclusive, by allowing the time when the anomalous indorsement was made to determine which rule should apply. Thus, if made before delivery to the payee, it will be presumptively the signature of a co-maker; if after delivery but before indorsement by the payee, presumptively that of a guarantor to the maker; if after indorsement by the payee, presumptively that of an indorser.[8] The same presumptions are usually applied also as between the original parties to the instrument.[9]

The general rule is that all these presumptions are rebuttable. Parol evidence has, however, been rejected on three grounds. (1) Such evidence would be varying a written instrument.[10] But as the very reason for admitting it is that the contract is ambiguous, this rule seems inapplicable. (2) Such evidence is admissible only as between the original parties and not as against a holder in due course.[11] (3) Such evidence, when offered to prove that the obligation assumed was a guaranty, is inadmissible as violating the Statute of Frauds.[12] These doctrines, however, are now obsolete, and parol evidence is almost universally admitted to show the actual intent of the parties.[13]

Where the Negotiable Instruments Law is in force the confusion arising from these various presumptions is done away with. The anomalous indorser is treated as a regular indorser,[14] except that his obligation is owed to the payee as well as to subsequent parties.[15] And parol evidence of a different intention is not admissible.[16] Only one case, apparently, is not provided for by the statute. Where a bill of exchange, payable to the maker, is indorsed by a third party as backer to the acceptor,[17] it would seem, although at least one case has held otherwise,[18] that the statute excludes the indorser from any liability to the maker.

ADMISSIONS OF PARTY'S PREDECESSORS IN TITLE AS EVIDENCE AGAINST HIM. — The rule that a party's extra-judicial admissions are competent evidence against him rests upon the broad ground that any former statements contrary to his present claim tend to show his unreliability.[1] Unless pro-

[7] Elliott *v.* Moreland, 69 N. J. L. 216.

[8] Good *v.* Martin, 95 U. S. 90.

[9] *Co-maker:* Ballard *v.* Burton, 64 Vt. 387. *Guarantor:* Milligan *v.* Holbrook, 168 Ill. 343. *Indorser:* Temple *v.* Baker, 125 Pa. St. 634; Phelps *v.* Vischer, 50 N. Y. 69. *No presumption:* Chaddock *v.* Vanness, 35 N. J. L. 517.

[10] Heath *v.* Van Cott, 9 Wis. 516.

[11] Schneider *v.* Schiffman, 20 Mo. 571.

[12] Temple *v.* Baker, 125 Pa. St. 634. *Contra,* Ford *v.* Hendricks, 34 Cal. 673. See AMES, CASES ON SURETYSHIP, 107.

[13] Good *v.* Martin, 95 U. S. 90.

[14] NEGOTIABLE INSTRUMENTS LAW, § 64.

[15] *Ibid.*, § 64, 1.

[16] Baumeister *v.* Kuntz, 42 So. 886 (Fla.). But see Kohn *v.* Consolidated Co., 63 N. Y. Supp. 265.

[17] See BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 50, 77, 141–3, 221.

[18] Haddock, Blanchard, & Co. *v.* Haddock, 118 App. Div. 412; 103 N. Y. Supp. 584. See 22 HARV. L. REV. 300.

[1] 2 WIGMORE, EVIDENCE, § 1048.